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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

RANDALL NAESS et al.,

Plaintiffs and Appellants,

v.

CITY OF SAN JOSE,

Defendant and Respondent.

H023689

(Santa Clara County

Super. Ct. No. CV778102)

In this administrative mandate proceeding, plaintiffs Randall Naess, DeEtte Richmond Sipos, and John C. Pfahnl, Co-Trustees of the Testamentary Trust created by the will of Edmund N. Richmond, deceased; Youngsville Development, Inc.; Youngsville Holdings, Inc.; Edenvale Holdings, Inc.; and YCS Investments challenged defendant City of San Jose's (City) certification of a Recirculated Environmental Impact Report (REIR)¹ for the Greenline/Urban Growth Boundary Project, an amendment to City's 2020 General Plan. They claimed that the REIR failed to comply with the trial court's previously issued preemptory writ of mandate "because it [did] not adequately address the potential environmental impacts of the [urban growth boundary] Project on the existing environment outside of the [urban growth boundary] but within the City's sphere of influence." The trial

¹ The EIR consists of a Draft EIR, a First Amendment to the Draft EIR, and a Second Amendment to the Draft EIR. The REIR consists of a Draft REIR and a First Amendment to the REIR.

court disagreed and denied plaintiffs' petition. Plaintiffs appeal, and we affirm the judgment.

LAW OF THE CASE

Preliminarily, City argues that our prior opinion in *Naess v. City of San Jose* (April 25, 2001, H020892) (nonpub. opn.) moots plaintiffs' claim under the law-of-the-case doctrine. We disagree.

In *Naess*, plaintiffs challenged the EIR at issue on several grounds. The trial court agreed with one of the challenges and issued a peremptory writ of mandate as to that one issue. According to the judgment and writ, the EIR failed to comply with the requirements of the California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21000 et seq.)² “because it did not adequately analyze the impacts of the Greenline/Urban Growth Boundary (the ‘UGB’) on the existing environment outside of the UGB and within the City’s sphere of influence.” City did not appeal from that aspect of the judgment. Plaintiffs appealed from the judgment to the extent that it was unfavorable to them. And we addressed and rejected plaintiffs’ contentions that the EIR failed to consider (1) the environmental impacts of reasonably foreseeable, accelerated and intensified housing development within the project (infill development), (2) the environmental impacts of reasonably foreseeable, accelerated and intensified housing development for San Jose workers in remote communities (leapfrog development), (3) the cumulative impact on infill development of 36 other 1998 general plan amendments, and (4) a reasonable range of alternatives. In the opinion, we concluded that the evidence supported City’s finding that the UGB did not change existing policy.

² Further unspecified statutory references are to the Public Resources Code. References to the “Guidelines” throughout this opinion are to CEQA Guidelines, promulgated by the State Resources Agency, contained in California Code of Regulations, title 14, section 15000 et seq.

From our opinion, City reasons that plaintiffs cannot attack the REIR for failing to evaluate the environmental impacts of the UGB against the existing physical environment; it implicitly urges that plaintiffs cannot challenge the REIR at all. (*Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350 [EIRs must report on the impact of proposed general plan amendments by comparing the proposal with the existing environment]; *Black Property Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974 [no need to assess environmental impact of a project when no changes to the status quo are proposed].)

But City's focus is misdirected. Plaintiffs' specific attack is that the REIR failed to comport with the judgment. It is the judgment in the first instance, not CEQA, that required the EIR to analyze the impacts of the UGB on the existing environment. If the judgment is inconsistent with CEQA, as City implies, it was incumbent upon City to appeal from it. Since City did not, it is bound by the judgment. (Code Civ. Proc., § 906 [appellate court is not authorized to review any decision or order from which an appeal might have been taken].)

LEGAL BACKGROUND AND SCOPE OF REVIEW

"CEQA was enacted to preserve and enhance the natural environment of this state by establishing procedures to '[e]nsure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions.' (§ 21001, subd. (d).) To ensure this goal, the statutes and Guidelines provide a vehicle for compelling public agency decision makers to document and consider the environmental implications of their actions. [Citations.] The EIR is the 'heart of CEQA.' [Citation.] 'In general terms the EIR process provides for extensive research and information gathering, consultation with other state, federal and local agencies and with persons or organizations directly concerned, public review and comment, evaluation and response to comments, and detailed findings. . . . The EIR is "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points

of no return” [citation], and “to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action.” [Citation.]’ [Citation.]

“CEQA requires local agencies to prepare an EIR on any project ‘which may have a significant effect on the environment.’ [Citation.] If an activity is a project as defined by CEQA and not otherwise exempt from CEQA, the agency must conduct an initial study to determine whether the project may have a significant effect on the environment. [Citation.] There are two possible results of the initial study. If the agency determines that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment it must prepare an EIR. If, on the other hand, the agency perceives no substantial evidence that the project or any of its aspects may cause a significant effect on the environment, the agency may prepare a negative declaration. [Citation.]

“ ‘At this juncture, we think it important to emphasize that the task of the judiciary is not to question the wisdom of proceeding with a project. Our purpose in reviewing environmental decisions is not to pass upon the correctness of a public entity’s conclusions, but only upon the sufficiency of an EIR or negative declaration as an informative document. [Citations.] In so doing, we look to see whether policymakers have been adequately informed of the consequences of their decisions, and whether the public has sufficient information to evaluate the performance of their elected officials.’ [Citation.]” (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 619-620, fn. omitted.)

Judicial review for CEQA compliance of an agency’s decision amending a general plan is governed by section 21168.5. (*Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 39.) The section provides that “the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency

has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.” (§ 21168.5.)

If an agency adopts an EIR that does not contain an adequate discussion of the environmental effects of a project, the agency has not proceeded in a manner required by law and, thus, has abused its discretion. (*Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671, 679.) “CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. . . . A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.) “The failure to include information in an EIR normally will rise to the level of a failure to proceed in the manner required by law only if the analysis in the EIR is clearly inadequate or unsupported.” (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620.)

“In the CEQA context, substantial evidence is ‘enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made is to be determined by examining the entire record. Mere uncorroborated opinion or rumor does not constitute substantial evidence.’ [Citation.]” (*Schaeffer Land Trust v. San Jose City Council, supra*, 215 Cal.App.3d at p. 621, fn. 6.)

“ ‘[Q]uestions such as the proper scope of the analysis, the appropriate methodology for studying an impact, the reliability or accuracy of data, the validity of technical opinions, and the feasibility of further studies . . . [are determinations which] are ultimately based on factual issues. . . . The question for a reviewing court should then be limited to whether the agency’s reasons for proceeding as it did are supported by substantial evidence.’ ” (*Barthelemy v. Chino Basin Mun. Water Dist., supra*, 38 Cal.App.4th at p. 1620.)

In reviewing an agency's decision to certify an EIR, we presume the correctness of the decision and it is the challenger's burden to prove that the EIR is legally inadequate. (*Barthelemy v. Chino Basin Mun. Water Dist.*, *supra*, 38 Cal.App.4th at p. 1617.) The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

"We note that our duties are identical to those of the trial court as we occupy, in essence, identical positions exercising the appellate function of determining whether the administrative record is free from legal error. Thus, we conduct our own independent review and the conclusions of the superior court and its disposition of the issues in this case are not conclusive on appeal." (*Schaeffer Land Trust v. San Jose City Council*, *supra*, 215 Cal.App.3d at p. 622.)

LEGAL BACKGROUND AND SCOPE OF REVIEW

City's policies to limit urban sprawl and manage its growth date from the 1970's when it made the Urban Service Area (USA) and 15 percent slope line limitation part of its general plan. The USA was a designated area beyond which development would not be allowed unless facilities and services existed or would exist to serve the proposed development. The slope line limitation generally prohibited development in hillside areas having a slope above 15 percent. City's Horizon 2000 General Plan, adopted in 1984, identifies the USA as a major strategy. City's 2020 General Plan, adopted in 1994, rechristened the strategy as the Greenline Strategy and reiterated that the Greenline Strategy is designed to insure that City's growth will proceed in an orderly, planned manner so as to provide efficient public services, achieve maximum utilization of public facilities, and share equitably the cost of the services and facilities.

In 1996, City began to implement the Greenline Strategy via amendment to the 2020 General Plan, which specifically defined the UGB. The amendment separated lands planned

for urban use from those planned for rural use by defining the UGB as all lands within the USA (and certain other lands referred to as the Urban Reserves) as depicted in the 2020 General Plan. It also envisioned that the UGB was to be the ultimate limit of urban development and stated an intention that significant modifications to the UGB should be strongly discouraged. To implement the intention it required that significant modifications to the UGB could be considered only during a comprehensive update of the general plan and only if City then made certain detailed findings.

The 2020 General Plan envisioned City's need to accommodate, by 2020, approximately 126,000 new jobs, 52,900 dwelling units, and supporting uses. Since the UGB did not change the existing or planned supply of land available for this need, City adopted the UGB general plan amendment via negative declaration. Plaintiffs, owners of lands outside the UGB and in the greenbelt, successfully challenged the procedure, and the trial court issued a writ of mandate directing City to prepare an EIR. City prepared the EIR, certified the EIR, and adopted the UGB amendment. Plaintiffs then instituted the prior action. After the trial court issued the peremptory writ of mandate, City prepared an initial study to evaluate any changes that may have occurred within the UGB following certification of the EIR. The initial study concluded that, although limited changes in existing conditions had occurred, they did not result in new or significant impacts. City then prepared the REIR, certified the REIR, and again adopted the UGB amendment. This, in turn, generated plaintiffs' third petition, the judgment denying the petition, and this appeal.

DISCUSSION

According to plaintiffs, the REIR is inadequate "because the environmental analysis is based upon outdated and incorrect assumptions made in connection with the City's adoption of the 2020 General Plan nearly a decade ago, in lieu of an examination of the *current actual physical* environment in and around San Jose as it existed at the time the REIR was prepared." They urge that the REIR failed to consider new data regarding the

existing environment, namely (1) the Cisco Project and its impact on the accelerated rate of development of the Coyote Valley Urban Reserves, (2) updated information on housing demand, and (3) “cumulative impacts of the Cisco Project and other development projects.”

1. Cisco Project.

Plaintiffs state that, between the time of the EIR and REIR, Cisco Systems proposed a development in the North Coyote Valley Campus Industrial Area that would create 20,000 new jobs. They point out that, under the General Plan, the addition of 5,000 new jobs in the Campus Industrial Area triggers the allowance of development in the Coyote Urban Reserve, a mid-Coyote Valley area reserved for housing. They acknowledge that development of the Campus Industrial Area was included in the General Plan (and, thus, is not “new data”). But they argue that the Cisco Project opens the door for development of the Urban Reserve “at a far more accelerated rate than anticipated in the 2020 General Plan.” They claim that the REIR failed to analyze the impact of the “drastic change in the number of jobs located in the North Coyote Valley” on the environment, particularly on the Urban Reserve.

But the REIR does address the issue. It states that the UGB does not encourage premature development of the Urban Reserve because the employee-prerequisite for development of the Urban Reserve is not the only trigger allowing development. It points out that the General Plan also requires a determination that City’s “fiscal condition is stable, predictable and adequate in the long-term.” It adds that, while the employee prerequisite may be met in the near future, the other condition “has not been realized and it is unknown when it will be satisfied.” It goes on to explain that, after both prerequisites have been met, a specific plan will then be prepared that will determine the timeframe for development of the Urban Reserve and, afterward, environmental impacts from that specific project will be analyzed. It reaffirms City’s expectation that the Urban Reserve will not develop during the timeframe of the General Plan and emphasizes that the UGB simply reinforces and refines policy decisions made in the context of General Plans since 1975.

The pivotal question here is simply whether the REIR adequately addressed the potential environmental impacts of the UGB on the existing environment insofar as the Cisco Project might affect development of the Urban Reserve at a more accelerated rate than anticipated in the General Plan. Here, the Cisco Project (1) was part of a development already anticipated in the General Plan, and (2) is not sufficient in and of itself to trigger development of the Urban Reserve. City could therefore rationally conclude that the UGB did not encourage accelerated development of the Urban Reserve. Underlying City's point of view is that the UGB does no more than make City's existing policy (the USA) permanent and, as such, does not affect the Urban Reserve any more than the USA. Again, the conclusion is rational and informed. Plaintiffs merely disagree rather than demonstrate that the analysis in the REIR is clearly inadequate or unsupported. Rather than so demonstrating, plaintiffs are simply attempting to question the policy underlying the General Plan.

2. Updated Housing Demand Information.

Plaintiffs urge that the REIR did not include or analyze information that became available after preparation of the EIR to the effect that San Jose would suffer a housing shortage over the next 20 years. They assert: "By failing to use the growth projections and housing demand as they existed at the time the REIR was prepared, the environmental baseline was skewed and City decision makers and the public were unable to accurately assess the impacts the UGB would have on both the Greenbelt Area and the Urban Reserves. As such the REIR failed as an informative document." According to plaintiffs, the REIR used the EIR's growth projections through 2010 rather than a subsequent growth projection published by the Association of Bay Area Governments (ABAG), which used a growth projection through 2020.

But again, the REIR addresses the issue and refers to the ABAG projections. It states: "Previous staff reports have indicated that the UGB contains enough land planned for residential use and this continues to be the case. [ABAG] recently issued its

preliminary Regional Housing Needs Distribution (RHND). San Jose's share of the region's housing need is 24,950 dwelling units for the period of June 30, 1999 to December 31, 2006. The current residential holding capacity of the General Plan, as of July 1999, is approximately 42,500 dwelling units, more than enough to meet the City's projected share of the region's housing need."

Plaintiffs argue that the above statement is misleading. They point out that City's residential holding capacity (24,950) is a projection through the planning horizon of the General Plan (2020) while the RHND is a projection only through 2006. They then extrapolate that, after 2006, only 17,550 residential units would be available through the planning horizon (42,500 – 24,950), a "number [that] falls far short of anticipated area housing demand through the year 2020."

Plaintiffs, however, overlook that the REIR does not project that full residential development will occur by 2020. It states that: "All of the alternatives assume that maximum job and housing growth will occur sometime between the years 2010 and 2020."

Thus, City could rationally conclude that the ABAG projections and its own projections were roughly equivalent and that the environmental baseline was not skewed so as to interfere with an accurate assessment of the impacts the UGB would have on both the Greenbelt Area and the Urban Reserves. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409 [the issue is not whether the studies are irrefutable or whether they could have been better; the relevant issue is only whether the studies are sufficiently credible to be considered as part of the total evidence].) We add that the REIR points out that "If more housing is needed beyond the existing 59,700 dwelling unit residential holding capacity now identified in the Plan, there are an array of options to accommodate new urban development within the confines of the UGB." These options include allowing higher densities or General Plan amendments.

3. Cumulative Impacts of the Cisco Project and Other Development Projects.

Plaintiffs contend that City abused its discretion in certifying the REIR because the REIR failed to analyze the cumulative impacts of the UGB and the Cisco Project as well as two other projects near the Cisco Project and one called Edenvale.

CEQA provides that reasonably foreseeable future development be considered in the EIR in a cumulative impacts analysis which discusses impacts from other “closely related” projects which might compound the impacts of the project under review. (Guidelines, §§ 15130, 15355.) Such a discussion “need not provide as great detail as is provided of the effects attributable to the project alone.” However, it should “reflect the severity of the impacts and their likelihood of occurrence.” (Guidelines, § 15130, subd. (b).) The discussion should include a list of “past, present and probable future projects” producing related or cumulative impacts or a summary of projections contained in an adopted general plan or related planning document, a summary of expected environmental effects to be produced by those projects, and a reasonable analysis of the cumulative impacts of the relevant projects, including reasonable options for mitigating or avoiding any significant cumulative effects of a proposed project. In general the cumulative impacts analysis should be “guided by the standards of practicality and reasonableness.” (*Ibid.*)

But the REIR explained that it was only a “recirculation of those sections of a previously prepared EIR that warranted recirculation for the purpose of complying with a court order. . . . The project is a General Plan amendment that does not include any specific development. Given the level of specificity of the project, the cumulative impacts analysis in both the previously circulated EIR and the [draft REIR] evaluated development allowed by the existing General Plan, pending proposals to amend the General Plan and proposals that might conflict with the General Plan in order to identify significant cumulative impacts. [¶] The *Campus Industrial* development in North Coyote Valley is allowed by the existing General Plan and its impacts are included in the cumulative impacts statements that are found throughout the [EIRs]. The proposed rezoning by Cisco Systems complies with the

existing General Plan land use designation and land use policies that govern such development and would, therefore, not need to be called out as being different”

In other words, the Cisco and the related projects were already permitted and anticipated by the General Plan and the cumulative impacts of what was permitted, as they affected the nonspecific UGB project, had already been analyzed in the EIR. From this, City could rationally conclude that, as a practical matter, a cumulative impacts analysis would be nothing more than duplicative. Plaintiffs cite no authority for the proposition that a duplicative cumulative impacts analysis must be performed under these circumstances. Plaintiffs may disagree that the analysis would be duplicative in this case. But the argument is simply a different point of view. It is not a demonstration of ill-informed decision-making or a lack of substantial evidence supporting City’s point of view.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Wunderlich, J.